Office - Supreme Court, U.S.
FILED
DEC 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.,
PETITIONERS

v.

THE STATE OF NORTH DAKOTA, EX. REL.
BOARD OF UNIVERSITY AND SCHOOL LANDS,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS FOR STATE OF COLORADO

J. D. MacFARLANE
Attorney General

CHARLES G. HOWE
Deputy Attorney General

JOEL W. CANTRICK
Solicitor General

JANET L. MILLER
First Assistant Attorney General
Natural Resources Section

KATHLEEN M. BOWERS
Assistant Attorney General
Natural Resources Section

Attorneys for Amicus

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: 866-3611

INDEX

Page

INTEREST OF AMICUS 2

SUMMARY OF ARGUMENT 2

ARGUMENT

I. THE QUIET TITLE ACT, 28 U.S.C. 2409a, IS NOT THE EXCLUSIVE BASIS FOR FEDERAL JURISDICTION TO DETERMINE A STATE'S CLAIM OF TITLE TO SOVEREIGN PUBLIC TRUST LANDS 3

II. THE STATUTE OF LIMITATIONS PROVISION OF THE QUIET TITLE ACT, 28 U.S.C. 2409a(f), DOES NOT BAR A STATE FROM MAINTAINING AN ACTION TO DETERMINE TITLE TO ITS PUBLIC TRUST LANDS 5

CONCLUSION 6

TABLE OF AUTHORITIES

Cases:

California v. Arizona, 440 U.S. 59 (1979) 5

Guaranty Trust Co. v. United States, 304 U.S. 126 (1938) 5

Jaffee v. United States, 592 F.2d 712 (3d Cir. 1979), *cert. denied*, 441 U.S. 961 (1979) 4

Montana v. United States, 450 U.S. 544 (1981) 6

National League of Cities v. Usery,
426 U.S. 833 (1976) 6

Oregon v. Corvallis Sand and Gravel Co.,
429 U.S. 363 (1977) 6

Pollard's Lessee v. Hagan,
44 U.S. (3 How.) 12 (1844) 5, 6

Quern v. Jordan, 440 U.S. 332 (1979) 4, 6

Shively v. Bowlby, 152 U.S. 1 (1894) 4, 5, 6

United States v. California, 332 U.S. 19, (1947) 5

United States v. Mission Rock Co.,
189 U.S. 391 (1903) 5

United States v. Oregon,
295 U.S. 1 (1935) 4

Weber v. Board of Harbor Commissioners,
85 U.S. (18 Wall.) 57 (1873) 6

Constitution and statutes:

United States Constitution, Tenth Amendment 6

5 U.S.C. 701-706 ..... 3, 4

5 U.S.C. 702 4

28 U.S.C. 1331 ..... 2, 3

28 U.S.C. 1361 ..... 2, 3

28 U.S.C. 2201-2202 ..... 2, 4

28 U.S.C. 2409a 3

28 U.S.C. 2409a(f) 2, 3, 5

43 U.S.C. 1301 *et seq.* 3

No. 81-2337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.,
PETITIONERS

v.

THE STATE OF NORTH DAKOTA, EX. REL.
BOARD OF UNIVERSITY AND SCHOOL LANDS,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS FOR STATE OF COLORADO

INTEREST OF AMICUS

This case involves whether a state can maintain a suit against the United States to protect the state's interests in its public trust lands. The State of Colorado, through its State Board of Land Commissioners, exercises jurisdiction and control over several thousands of acres of public trust lands. Colorado has entered as an amicus in this case in support of the respondents and of the decision of the Eighth Circuit Court of Appeals which held that the statute of limitations provision of the Quiet Title Act, 28 U.S.C. 2409a(f), does not bar an action by a state against the United States to adjudicate ownership of public trust lands.

The United States alleges that this decision was in error and urges this Court to reverse the Eighth Circuit Court of Appeals and further urges this Court to rule that the Quiet Title Act is the exclusive grounds for federal jurisdiction in this case. It would be contrary to Colorado's best interests if this Court were to adopt the position of the United States.

Colorado holds its public lands in trust for the benefit of its citizens. Title to these lands should not be subject to defeasance by the United States by a mere assertion of contrary ownership, as the United States attempted to do in this case, without resolution of the merits of the state's position by the judiciary.

SUMMARY OF THE ARGUMENT

The Quiet Title Act, 28 U.S.C. 2409a, is not the sole basis of federal jurisdiction to determine ownership of public trust lands. In this case, jurisdiction was also proper under the federal question statute (28 U.S.C. 1331), the mandamus statute (28 U.S.C. 1361), the declaratory judgment statute (28 U.S.C. 2201-2202) and

the judicial review provisions of the Administrative Procedures Act (5 U.S.C. 701-706).

The Eighth Circuit Court of Appeals properly held that the statute of limitations of the Quiet Title Act, 28 U.S.C. 2409a(f), does not bar an action by a state to determine ownership of its public trust lands. Under the principle of *quod nullum tempus occurrit regi*, a statute of limitations may not be raised as a defense against a sovereign. In addition, under the equal footing doctrine and the Tenth Amendment to the United States Constitution, a state's ownership of public trust lands is not subject to defeasance by the operation of a federal statute.

I.

THE QUIET TITLE ACT, 28 U.S.C. 2409a, IS NOT THE EXCLUSIVE BASIS FOR FEDERAL JURISDICTION TO DETERMINE A STATE'S CLAIM OF TITLE TO SOVEREIGN PUBLIC TRUST LANDS.

This case involves North Dakota's assertion of title to a portion of the Little Missouri River under the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*. The United States has conceded that if the Little Missouri River were navigable at the time of North Dakota's statehood, then the bed of said river belongs to North Dakota. (Petitioners' brief at 15.) However, the United States contends that the issue of navigability must be determined exclusively under the Quiet Title Act, 28 U.S.C. 2409a, since that issue will ultimately determine title to the bed of the river. Colorado disagrees with this position.

In this case, North Dakota originally asserted jurisdiction in the federal district court under the federal question statute (28 U.S.C. 1331), the mandamus statute (28 U.S.C. 1361), the declaratory judgment statutes (28

U.S.C. 2201-2202), and the judicial review provisions of the Administrative Procedures Act (5 U.S.C. 701-706). North Dakota sought a declaration that the Little Missouri River was navigable at the time of North Dakota's statehood. North Dakota further sought an injunction to prevent the Secretary of Interior and the Secretary of Agriculture from exercising ownership, on behalf of the United States, to the bed of the river.

Colorado maintains that North Dakota's basis for jurisdiction in the federal district court was proper. Nevertheless, the district court ordered North Dakota to amend its complaint to include the Quiet Title Act. North Dakota amended its complaint accordingly. Although the Eighth Circuit Court of Appeals declined to rule on whether the amendment was necessary, Colorado agrees with both the United States and North Dakota that this jurisdictional issue is extremely important and merits consideration by this Court.

As indicated above, the ultimate ownership of the Little Missouri River turns on whether said river was navigable at the time of North Dakota's statehood. This Court has previously held that navigability is a federal question. *United States v. Oregon*, 295 U.S. 1, 14 (1935); *Shively v. Bowlby*, 152 U.S. 1 (1894). Also, this Court has declined to disturb a ruling by the Third Circuit Court of Appeals recognizing that the amendments to the Administrative Procedure Act, 5 U.S.C. 702, were designed to allow equitable actions, such as this one, to proceed under 28 U.S.C. 1331. *Jaffee v. United States*, 592 F.2d 712, 718-19 (3d Cir. 1979), *cert. denied*, 441 U.S. 961 (1979).

In addition, it is significant that the Quiet Title Act itself does not state that it is intended to provide the exclusive jurisdictional base for determining issues impacting title to land. This legislative silence itself is a significant indication of legislative intent. *Quern v. Jordan*, 440 U.S. 332, 343 (1979).

Nevertheless, the United States claims that navigability, which is a federal question, can only be determined under the Quiet Title Act. The United States also contends that North Dakota could only obtain judicial review of the actions of the Secretary of Interior and the Secretary of Agriculture under the Quiet Title Act since their actions involved assertions of ownership to real property, irrespective of the Administrative Procedures Act and the statutes which provide for injunctive and mandamus relief.

The United States fails to recognize that jurisdiction may be proper under more than one statute. The Quiet Title Act provides *a* method of resolving issues affecting ownership of real property, but it does not provide the only method. *See California v. Arizona*, 440 U.S. 59 (1979).

II.

THE STATUTE OF LIMITATIONS PROVISION OF THE QUIET TITLE ACT, 28 U.S.C. 2409a(f), DOES NOT BAR A STATE FROM MAINTAINING AN ACTION TO DETERMINE TITLE TO ITS PUBLIC TRUST LANDS.

Under the doctrine of *quod nullum tempus occurrit regi*, it is undisputed that a statute of limitations cannot be raised as a defense against a sovereign. *United States v. California*, 332 U.S. 19 (1947); *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938). It is also without question that a state holding title to public trust lands is an attribute of state sovereignty. *United States v. Mission Rock Co.*, 189 U.S. 391 (1903); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 12 (1844). In recognition of these tenets, the Eighth Circuit Court of Appeals properly held that the statute of limitations provision of the Quiet Title Act, 28 U.S.C. 2409a(f), did not bar North Dakota from

maintaining an action to determine title to the bed of the Little Missouri River.

The Eighth Circuit Court of Appeals also properly noted that neither the statute of limitations itself nor its legislative history mentions actions by states. The absence of such an express inclusion is an indication of legislative intent. *Quern v. Jordan*, 440 U.S. 332 (1979); *Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57 (1873).

Nevertheless, the United States maintains that the quiet title statute of limitations should apply because this case involves a suit by an inferior sovereign, North Dakota, against the superior sovereign, the United States. On the contrary, North Dakota is on an equal footing with the United States in this case.

The new states were admitted into the Union on an equal footing, in all respects, with the original thirteen states. A state's title to public trust lands obtained under the doctrine of equal footing is not subject to defeasance by operation of a federal statute. *Montana v. United States*, 450 U.S. 544 (1981); *Oregon v. Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977); *Shively v. Bowlby*, 152 U.S. 1, 26 (1893); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1844). The same result obtains under the Tenth Amendment to the United States Constitution. *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976). Accordingly, in this case, North Dakota's claim of title to the bed of the Little Missouri River cannot be defeated by operation of the quiet title statute of limitations.

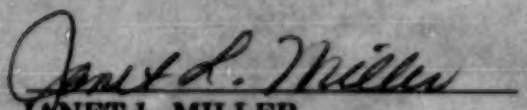
CONCLUSION

A state's right to maintain a suit against the United States to protect the state's interests in its public trust lands should neither be limited to an action solely under the Quiet Title Act nor barred by the statute of limita-

tions of the Quiet Title Act. Accordingly, Colorado urges this Court to affirm the decision of the Eighth Circuit Court of Appeals and to rule that jurisdiction to determine ownership of public trust lands may properly lie outside the Quiet Title Act.

Respectfully submitted,

FOR THE ATTORNEY GENERAL



JANET L. MILLER
First Assistant Attorney General
Natural Resources Section

KATHLEEN M. BOWERS
Assistant Attorney General
Natural Resources Section

Attorneys for Amicus Curiae

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: 866-3611

CERTIFICATE OF SERVICE

I, Janet L. Miller, hereby certify that I am a member of the bar of this Court and counsel of record for The State of Colorado and that on December 16, 1982, pursuant to rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing AMICUS BRIEF of the State of Colorado, by first class mail, postage prepaid, to the following:

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

JACQUES B. GELIN
EDWARD J. SHAWAKER
Attorneys

Department of Justice

ROBERT O. WEFALD
Attorney General of the
State of North Dakota

OWEN L. ANDERSON
Special Assistant
Attorney General

GEORGE DEUKMEJIAN
Attorney General of the
State of California

N. GREGORY TAYLOR
Assistant Attorney General

DENNIS M. EAGAN
(Counsel of Record)

BRUCE S. FLUSHMAN
Deputy Attorneys General

WILSON L. CONDON
Attorney General of the
State of Alaska

ROBERT K. CORBIN
Attorney General of the
State of Arizona

WILLIAM J. 'GUSTE, JR.
Attorney General of the
State of Louisiana

MICHAEL T. GREELY
Attorney General of the
State of Montana

RICHARD H. BRYAN
Attorney General of the
State of Nevada

JAN ERIC CARTWRIGHT
Attorney General of the
State of Oklahoma

DAVID FROHNMAYER
Attorney General of the
State of Oregon

MARK V. MEIERHENRY
Attorney General of the
State of South Dakota

KENNETH O. EIKENBERRY
Attorney General of the
State of Washington

STEVEN FREUDENTHAL
Attorney General of the
State of Wyoming

I certify that all parties required to be served have been served.

Janet L. Miller
First Assistant Attorney General